CHAPTER XVIII

THE STATUS OF THE COURTS AND THE INDEPENDENCE OF THE JUDGES

Regulations passed in Bengal[1], Madras[2] and Bombay[3] alike emphasised the need for the judicial functions of the Government to be administered by courts of justice distinct from the legislative and executive authority of the state. But the duties of the Sadar Courts were not exclusively judicial, and in the exercise of their administrative functions the Sadar Courts of Bengal and Madras appear to have been regarded as branches of the executive. Neither the Presidency Governments nor the Directors in London had any hesitation in issuing directions to those Courts on matters not of a strictly judicial nature[a]. It is not surprising that the distinction between judicial and administrative business sometimes became blurred. In 1818 we find the Bengal Government suggesting to the Calcutta Court how, in its opinion, the Court's work could be done more efficiently, even to the extent of advising how the benches should be constituted, what work each bench should do, and which judges should sit on them[4].

The work of the Sadar Courts was kept under close scrutiny by the Presidency Governments and by the Directors in London. Delay in the disposal of civil appeals was a recurrent source of concern, and the Government (as later) was disposed to think that the fault, at least in part, lay with the judges. In 1826 the Governor General in Council called upon the Calcutta Court to submit an explanation if the number of civil appeals finally decided

---

1. Beng. Regn. 2 of 1801, s. 1.
2. Mad. Regn. 4 of 1806, s.1.
3. Bom. Regn. 5 of 1820, s.1.

a Examples are numerous. Thus, in Bengal, "Ordered that a copy of the foregoing letter...be transmitted to the Nizamat Adalat with directions to communicate generally the sentiments expressed in it to the Courts of Circuit" (Crim. J.C., 25 Apr. 1812, no. 8, P/130/49); "you should have called on him [the Chief Judge] for a more particular account of the order [concerning the use of fetters in Alipore Jail] which he issued to the magistrate" (Judl. Letter to Bengal, 18 Feb. 1820, para. 84); "We lament that after witnessing the total failure of all the measures which had been adopted for tranquillising the Pergunnah you had not ordered the Nizamat Adalat to make a full report to you on the subject" (Judl. Letter to Bengal, 13 Dec. 1820, para. 126).

And in Madras: "Ordered that a copy of these paragraphs (of a London letter) be transmitted to the Court of Foujdari Adalat with instructions to report on the state of the judicial buildings...." (M.J.C., 1 Jul. 1814, fol. 4272, P/323/8); draft regulations "have been referred for the report of the Sadar Adalat, which that Court has been instructed to submit within fifteen days..." (M.J.C., 15 June, 1816, fol. 2486, P/323/25); "In revising these Drafts the Foujdari Adalat will abstain from all discussion with regard to the principles laid down". (M.J.C., 8 July 1816, fol. 2817, P/323/25.

4. Civ. J.C. (L.P.), 8 Mar. 1816, no. 7, P/149/26.

in any one month fell below ten[b], and as late as 1834 Sealy, the senior judge at Allahabad, was asked to explain why he had decided no civil cases singly in the first half of that year and why his "disposals" were less than those of the other judges[5].

The relationship between the Sadar Court and the Government varied from one Presidency to another. In Bombay relations between Court and Government appear to have been harmonious[c]; it was with the Supreme Court that the Sadar Court came into conflict[d]. In Bengal relations between the executive and the Court seem only to have been seriously disturbed when, in 1827, judge Courtney Smith incautiously cast doubt on the financial solvency of a future British Government in Bengal. The Vice-President in Council took very strong exception to the judge's remarks and, as has been noted earlier[e], his removal from judicial office was provisionally determined upon.

In Madras the position was different. Notwithstanding the fact that the Council usually included a former judge of the Sadar Court in addition to the member of Council who held the office to Chief Judge, relations between the Government and the Court were at times strained. The Court was expected to show punctilious respect to the Government, and in the early years of the century the judges' manner of addressing the Government verged on the subservient. In 1814 there was a difference of opinion between the Court and Government over the advice to be given by the former to a zillah judge[f]. The Court sought to justify the view it had taken.

b Civ. J.C. (L.P.), 14 Sep. 1826, no. 3, P/151/11. The judges protested vigorously, and Courtney Smith was moved to remark that the only effect of such a rule "can be to raise the idea that in Government's opinion the highest of their Courts requires watching and stimulating because it has proved itself deficient in diligence and energy in the discharge of its important functions": Civ. J.C. (L.P.), 21 Dec. 1826, no. 10, P/151/16.

5. Civ. J.C. (W.P.), 4 Aug. 1834, no. 2, P/152/1.

c In 1829 there was a marked difference of opinion between Sir John Malcolm, the Governor, and John Romer, the Chief Judge, on the question whether a Persian Prince who had been arrested in the North Konkan on a charge of murder should be put on trial. Romer was strongly of the opinion that the law should take its course, but Sir John considered that the issue was a political one and that the Prince should be detained in custody as a State Prisoner until he could be sent to Basra—a view with which the majority of the Council agreed. Romer was at the time a member of Council and was of course expressing his views in that capacity: B.J.C., 25 Feb. 1829, no. 24; 22 Apr. 1829, nos. 40-46; 29 Apr. 1829, nos. 51-57; 13 May 1829, nos. 137-9; P/400/23, 25, 26.

d See p. 150 above.

e See p. 71 above.

f A zillah judge had asked the Sadar Adalat for authority to obtain military assistance to secure the arrest of a man who was obstructing the execution of a decree. The Court considered that it could give no advice as the acts of the judge might become the subject of an appeal to it. The Governor in Council considered that the course to be pursued in carrying a decree into execution was entirely independent of the merits of the decree and was therefore a question upon which it could not be improper for the judges of the Sadar Adalat to express an opinion—and they were directed to do so. M.J.C., 19 Aug. 1814, fols. 4788, 4792, P/323/9; 30 Aug. 1814, fols. 5018, 5028, P/323/10.

The Governor was unimpressed, and he observed that while he had no wish to impute blame to the judges he felt it necessary to remark that there were expressions in their proceedings which betrayed "an impatience of temper inconsistent with the respect which they owe to the Government"[6]. The judges hastened to record their extreme concern that the Governor in Council should have felt it necessary to make such a remark. He had understood what they said in a sense very different from that which they had intended, and they restated the facts and relevant law in greater detail. These observations were "humbly submitted ... in the hope that they will serve to efface the unfavourable impressions which were made on the mind of the Hon. the Governor in Council ... and the Court beg leave to repeat their solemn assurance that in drawing up those proceedings they were actuated by no disrespectful feelings"[7]. That assurance was received by the Governor in Council "with much satisfaction"[8].

The office of judge seems not to have been held in the same high regard in Madras as in the other Presidencies. To move Sadar Court judges to other appointments, even to lower judicial office, was not considered inappropriate. In the interval between holding office as a Sadar Court judge and appointment as Chief Judge, John Ogilvie was successively judge of a provinicial court of appeal, Treasurer of the Government Bank, and a member of the Board of Trade, and his successor, Charles Harris, was a Collector and Magistrate[g]; Graeme on ceasing to hold office as judge (and subsequently Chief Judge) became judge of a provincial court.

The Madras Government did not seek to interfere with the Court in the exercise of its ordinary civil or criminal jurisdiction, that is to say in those cases in which the decision of the Court was final or subject, in civil matters, to appeal. But the Government was not bound by, and at times treated with little respect, the opinion of the Court in those cases in which the final decision lay with the Governor in Council. These were cases of misconduct by servants of the Company and of offences against the State.

Of the former, the case of Oakes has earlier been referred to[h]. It resulted in the removal of Scott and Greenway from office as judges of the Sadar Court on the ground that they had, when reviewing proceedings of the enquiry by a Commissioner into the charges against Oakes, not only misconceived the nature of those proceedings, but had failed to act impartially.

Persons charged with offences against the State were usually tried by

---

6. M.J.C., 30 Aug. 1814, fol. 5028, P/323/10.
7. M.J.C., 13 Sep. 1814, fol. 5152, P/323/10.
8. *Ibid.*, fol. 5182.

g In 1807 Harris, then General Agent for the Salt Monopoly, and Ogilvie, the second judge of the provincial court of appeal, Centre Division, were permitted to exchange offices.

h See p. 107 above.

Special Commissioners appointed by the Governor in Council. The ordinary procedure at a criminal trial applied, save that all trials had to be referred to the Foujdari Adalat which was required to report its sentence (which included acquittal) to the Governor in Council and "wait the orders of government before they direct their sentence to be carried into execution"[9] —an ambiguous provision which was to cause difficulty.

Two such cases were referred to the Court in 1833 and 1834. In both cases a number of persons had been convicted by a Special Commission. The Court found the evidence to be unsatisfactory and considered that the convictions should be set aside and the prisoners be acquitted. In both cases the Governor in Council[i] disagreed with the Court's finding. In the earlier case he did not interfere with the acquittal, and that would have been the end of the matter had not the judges thought fit "in reference to the opinion of ..... the Governor in Council as well as for their own justification", to record more fully the reasons for their decision[10]. They were unwise to have done so, for the Governor in Council regarded the Court's observations as uncalled for. "The case having been ... disposed of conclusively, there was no occasion for any further reference to Government from the Foujdari Adalat"[11]. As however that Court had re-opened the matter the Governor not only proceeded to comment critically on its evaluation of the evidence[j] but went on to remark that "He can see in this address no mark of that deference to the opinion of Government which is professed but evident marks of disregard for it. As it would have been unbecoming and disrespectful had the Judges of the Special Commission entered into a controversy with the Foujdari Adalat as to the reasons for setting aside their judgment and passing a sentence contrary to it, it appears to the Governor in Council equally unbecoming and disrespectful on the Judges of the Foujdari Adalat submitting a controversial argument in support of their judgment against the opinion of Government. The Judges of the Foujdari Adalat will understand that when they have done their part in the discharge of their judicial office, and submitted their proceedings for the orders of Government, the only duty which remains to them is to obey and execute

9. Mad. Regn. 20 of 1802, s. 5.

i The Council included Oliver, the Chief Judge, and also (when the first case was under consideration) Harris, a former holder of that office. The Governor was S. R. Lushington.

10. M.J.C., 25 Oct. 1834, no. 16, P/324/92.

11. *Ibid.*, no. 17.

j He records that he is unable to find in the Court's proceedings "A deliberate judicial examination of the evidence, discriminating between the facts that are substantiated and fully proved, and those points of the case upon which the proof is doubtful or exceptionable, giving due weight to what is worthy of acceptation and credit while the rest is rejected, and showing distinctly the grounds of the judgment of the Court. On the contrary he finds in it only a controversial argument, in which everything is alleged which can be brought forward on one side, even to conjecture, while the facts and circumstances on the other side are kept out of view" : M.J.C., 25 Oct. 1834, no. 17, P/324/92.

the orders they shall receive, without controversy or delay, as it is the duty of the subordinate courts to obey and execute their orders"[12].

In the second case the Governor in Council modified the Court's order of acquittal by directing that five of the prisoners be confined for three years or until they could furnish security for good behaviour and appearance when required. The Foujdari Adalat questioned the authority of the Government to modify the Court's sentence. The Governor in Council's reply was terse; "The Regulation says that they shall wait the orders of Government and of course they are bound to obey the orders of Government whatever they may be, the discretion and authority of Government being entirely unrestricted"[13].

The Independence of the Judges

The judges were the covenanted servants of the Company. They were appointed to the Court by the Company and held office at its pleasure[k]. Appointment to the Court was not necessarily the end of the road, for a judge did not cease to be eligible for elevation to the Council[l] nor was he debarred from attaining other high administrative office[m].

Although the Sadar Court judges had no statutory safeguard of judicial tenure, to describe them as being under the thumb of the Governor General is to do them and the Company an injustice. The independence of the judiciary depended not only on the attitude of the Company, but also on the character of the judges. The latter were able and intelligent men, conscious of the obligations of the high office which they held and of their oath to administer justice without fear, favour or hope of reward. The Company, on its part, did not exercise its powers capriciously or arbitrarily. Scott and Greenway were the only judges removed from office, but both remained in the service of the Company. Removal from office of Courtney Smith had been provisionally resolved upon, but the resolution was not implemented, and in his case it could be said that the Bengal Government displayed considerable forbearance. In both cases the judges had acted

12. M.J.C., 25 Oct. 1834, no. 17 P/324/92.

13. *Ibid.*, no. 20.

k Bentinck seems to have envisaged removal from office as a sanction appropriate only in cases of "sloth, incapacity or wilful error": letter to the Bengal Government, 26 Jan. 1831, para. 8: Sel. Cttee. Rep., P.P. 1831-32, vol. XII, 490. The judges of the Supreme Court held office at the pleasure of the Crown, as did the judges appointed under the Indian High Courts Act of 1861. This continued to be the rule until the coming into force of the Government of India Act 1935.

l In Bengal, Lumsden, Henry Colebrooke, Harington, Stuart, Fendall, Ross, Blunt and Henry Shakespear became members of Council. So also in Madras did Stratton, Ogilvie, Harris, Graeme, Oliver, Lushington and Bird; and in Bombay, Romer, Sutherland, Ironside and Sir George Anderson.

m In Bengal, Crisp became senior member of the Board of Revenue, Ker the Commissioner in Cuttack, Sir Edward Colebrooke and W.B. Martin Residents at Delhi; in Madras, Graeme became Resident at Nagore and in Bombay Sutherland became Resident at Baroda and Sir George Anderson Governor successively of Mauritius and Ceylon.

in a manner which the Company could hardly be expected to overlook. Moreover it was not the Company's judges alone who were the subjects of criticism. Judges of the King's Courts did not escape censure. The Privy Council, as has been seen, had advised the recall of Sir Peter Grant from Bombay to answer charges which had been made against him, and earlier, in 1810, a judge of the Madras Supreme Court, Sir Henry Gwillim, had been removed from office on the advice of the Privy Council[14].

Servants of the Company though they were, it is clear that by 1830 the judges had acquired a degree of independence in the exercise of their judicial office which generated alarm in the minds of the more paternally minded members of the administration. For them the separation of powers had no place in a country where supreme judicial control must be in the hands of the Government if the respect of the native population was to be retained. That control, they believed, the Government had surrendered, leaving the courts, unrestrained by the pressure of public or professional opinion, free to act without regard to the public good. Thus David Hill, the Chief Secretary to the Madras Government, in a minute of the 8th March 1830, thought that the courts would probably become "an engine of the greatest oppression and practical injustice when dissevered from the rest of the body politic"[15], while Holt Mackenzie[n], who at one time had been the Registrar of the Court, considered that "to put judges arbitrarily over the people, whom the people cannot control, and to leave them uncontrolled, is to abandon the most sacred duty of supreme power". He was particularly critical of the Calcutta Court which he said "is under no adequate control; it is, in fact, more independent of control than the Government, the judges not being responsible for the consequences of their acts, however politically mischievious, not being touched by public opinion, nor in civil matters subject to superior authority .... The establishment of a court so entirely free from check is indeed an unexampled tyranny."[16] Sir Charles Metcalfe shared these views, and paid unconscious tribute to the independence of the judges when he referred in a Minute to "the State struggling in vain for justice, before tribunals composed of its servants deciding according to their own whims and fancies...."[17].

These were extreme views. They were not shared by Bentinck, who considered that the honour, intelligence, and experience of the judges would

14. Privy Council Records, vol. 186, p. 116.

15. Sel. Cttee. Rep., P.P., 1831-32, vol. VIII, General Appendix, 128.

n "A very clever man who was mainly guided by theory, but who was unfortunately deficient in that local knowledge and matter-of-fact experience, without which the fairest theories have failed": Hon. F. S. Shore, *Notes on Indian Affairs*, I, 183. Holt Mackenzie was Secretary to the Governor General in 1827 when the proposal to remove Courtney Smith was under consideration.

16. Minute, 1 Oct. 1830, Sel. Cttee. Rep., P.P., 1831-32, vol. XIII, General Appendix, 135, para. 40.

17. Minute, 11 Apr. 1831, Civ. J.C. (L.P.), 19 Apr. 1931, no. 20; P/151/64 Sel. Cttee. Rep., P.P., 1831-32, vol. XII, 511.

always constitute a sufficient security against any abuse of their powers. Nor did he regard a closer superintendence of the proceedings of the Court as requisite either in the interests of the Government or the public wellbeing[18]. Wellesley had hoped that the Chief Judge of the Calcutta Court would rank with the Chief Justice of the Supreme Court[19]. But that aspiration was never realised. Place was provided for the Chief Justice and puisne judges of the Supreme Courts in the official Table of Precedence, but none for the judges of the Sadar Courts as such. By the time they were appointed to the Sadar Court the judges had attained the rank of Senior Merchant in the Company's service; and it was as Senior Merchants that they took their place at the foot of the Table according to their seniority in that rank. Their place was below that accorded to the Recorder of Prince of Wales Island (Penang)[o]. The omission of any reference to the judges of the Sadar Courts in the Table of Precedence has helped to obscure the importance of the part they played in the administration of justice in the Indian Presidencies[p].

18. Letter, Secretary to the Governor General to Deputy Secretary, Bengal Government, 26 Jan. 1831, Sel. Cttee. Rep., P.P., 1831-32, vol. XII, 490, paras. 6, 7.

19. Mornington to Dundas, 5 Mar. 1800, *Despatches of the Marquess of Wellesley*, (Ed. Montgomery Martin), II, 231.

o In the Table of Precedence of 1834 the Chief Justice and puisne judges of a Supreme Court were placed fifth and eighth respectively. Senior Merchants were included in a group allotted the twelfth place—"all other persons to take place according to general usage". In Madras and Bombay where the office of Chief Judge was held by a member of Council the Chief Judge's place in the Table was determined by his seniority as a Councillor.

p A short Note on the manner in which the Privy Council dealt with appeals from judgments of the Sadar and Supreme Courts is at the end of this chapter.

NOTE

Appeals to the Privy Council

During the periods shown in the Table below 107 appeals from judgments of the courts in Bengal, Madras and Bombay were decided by the Privy Council after a full hearing. 77 of these appeals were from judgments of the Sadar Courts and 30 from decisions of the Supreme Courts. 53 (or 68%) of the former and 19 (or 63%) of the latter were dismissed. No firm conclusions can be drawn from so few figures, but they do tend to show that the judicial work of the Sadar Courts, particularly that of the Calcutta Court, was done satisfactorily.

TABLE

Presidency	*Court*	*Decrees*			
		No.	*Affirmed*	*Reversed*	*Varied*
BENGAL	Sadar	35	26	5	4
(1801—1834)	Supreme	19	15	3	1
MADRAS	Sadar	17	11	5	1
(1806—1834)	Supreme	6	3	2	1
BOMBAY	Sadar	25	16	9	nil
(1821—1834)	Supreme	5	1	3	1

Accurate figures are difficult to obtain as some of the relevant Records of the Privy Council are incomplete. Many appeals were withdrawn, compromised, or dismissed for want of prosecution. Such appeals have not been taken into account.

GOVERNORS-GENERAL AND GOVERNORS, 1801-1834

Governors-General of Fort William in Bengal

	Assumed office
Earl of Mornington, afterwards Marquis Wellesley	18 May 1798
Lord Cornwallis (d. 5 Oct. 1805)	30 July 1805
Sir George Barlow (Acting*)	10 October 1805
Lord Minto	31 July 1807
Earl of Moira, afterwards Marquis of Hastings	4 October 1813
John Adam (Acting)	13 June 1823
Lord Amherst	1 August 1823
W.B. Bayley (Acting)	13 March 1828
Lord William Bentinck	4 July 1828

*Lord Curzon was of the opinion that, save for a few months, Barlow was a substantive Governor General: see his *British Government in India*, vol. II, pp. 48, 84.

Governors of Madras

Lord Clive	5 September 1799
Lord William Bentinck	30 April 1803
W. Petrie (Acting)	11 September 1807
Sir George Barlow	24 December 1807
Sir J. Abercrombie (Acting)	21 May 1813
Hugh Elliot	10 September 1814
Sir Thomas Munro	10 June 1820
H.S. Graeme (Acting)	10 July 1827
Stephen Rumbold Lushington	15 October 1827
Sir Frederick Adam	25 October 1832

Governors of Bombay

Jonathan Duncan (d. 1 August 1811)	27 December 1795
G. Brown (Acting)	11 August 1811
Sir Evan Nepean	12 August 1812
Mountstuart Elphinstone	1 November 1819
Sir John Malcolm	1 November 1827
Sir T.B. Beckwith (Acting) (d. 15 Jan. 1831)	1 December 1830
John Romer (Acting)	17 January 1831
Lord Clare	21 March 1831

GLOSSARY

(Many of the words listed have more than one meaning: that given is the one appropriate in the context in which it appears).

Adalat	Court of justice.
Dewani Adalat	Civil court.
Foujdari Adalat	Criminal court.
Nizamat Adalat	Criminal court, in Bengal.
Futwa	Opinion of the Mohammedan law officer on a criminal case (see p. 28).
Kazi	Principal Mohammedan law officer attached to a Sadar Court.
Moulvi	Mohammedan law officer.
Mufti	Mohammedan law officer.
Nawab Nazim	Title of the Governor of Bengal under the Mogul Emperor.
Pundit	Hindu law officer.
Sadar (adj.)	Chief, or principal.
Vakil	Practising advocate; pleader.
Vizier	Principal minister under a Mohammedan prince.
Zillah	Administrative district.